

## Central Law Journal.

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### THE "PUBLIC HEALTH BILLS" OF THE AMERICAN MEDICAL ASSOCIATION.

It is unnecessary to say that we are in hearty sympathy with all legislation honestly proposed in the interest of the public health and which approximately achieves the end desired. But we desire to be understood that we are as equally antagonistic to any such legislation which is apparently intended to be more in the interest of some special class than to meet any necessary public emergency.

Readers of the Central Law Journal are well aware of the fact that we regard the police power as a sacred deposit of unusual power placed by the people with the legislature in trust to meet great public emergencies affecting the health, safety or security of the whole community. It is, therefore not to be drawn upon carelessly or promiscuously by any particular class of people who may think to use it to shut off competition in their particular avocation by alleging that their competitors are making an article for public consumption which is inimical to the public health, safety or security.

We regret that it becomes necessary for us at this time to direct these observations at the recent efforts of the American Medical Association to secure the passage of certain public health bills whose object is clearly to destroy the business of the principal competitors of the medical fraternity, the manufacturers of proprietary medicines.

Pressing hard upon the advantage gained by the opening wedge offered by the "pure food" laws, which laws on other occasions we have stated to be dangerous innovations on principle, but which we were willing to justify on the ground of an overruling public necessity, the medical profession now

proposes to go a considerable step farther and is besieging legislatures in many states to secure legislation that will be effective to put all proprietary medicines under the ban of the law, by imposing upon the manufacturers thereof the most unreasonable and unnecessary restrictions. They wish to require such manufacturers to reveal all their trade secrets and formulæ, to compel them to renounce their trade names, worth in some cases millions of dollars, and in their place to adopt scientific terms descriptive of the ingredients used, to refrain from setting forth on the label of the receptacle containing the medicine the diseases for the treatment of which the remedy is indicated, to place on the label also the flaring symbol of "poison," where any ingredient in its composition, no matter how harmless it may be when taken in proper proportions, is recognized as a poison. Bills containing one or more of these propositions are pending before many of our state legislatures and have been referred to us by correspondents for our opinion, which accounts for our recent interest in this subject.

All of these propositions are utterly wrong and absolutely defenseless in the face of constitutional inhibitions, safeguarding property rights of the individual. Unless the police power is to become the tool of every designing clique or class in our population, its exploitation must be limited solely to cases of overruling public necessity. There must not be a delicate balancing of arguments, as to the merits of any legislative proposition which presumes to sacrifice large property interests without due process of law under justification of the police power. Unless the public emergency is so overwhelming as to admit of no other remedy the efforts to promote such legislation should be promptly discouraged.

Legislatures should understand that the police power is not an affirmative power to do something which would be justified by any other usual legislative prerogative but is an extraordinary license, understood and granted by the people, which permits the legislature to violate sacred constitutional rights of person or property when an overruling public emergency demands it. Many

legislatures and some courts have gone astray recently in regarding this mere license as an unrestricted affirmative power in the legislature to do as they pleased. And the courts have winked at the subversion of constitutional restrictions by means of this power, by permitting the legislature to be the sole judge of the fact whether an overruling emergency existed and whether the proposed legislation was a reasonable remedy to meet the emergency thus often arbitrarily created. Such a construction of the police power undermines and nullifies all constitutional restrictions and places the persons and property of the minority where they become subject to the whims and caprices of a thoughtless and prejudiced majority.

The national pure food law and state legislation which has been copied after it, has gone as far as any present public emergency will justify. Even such legislation is so close to the brink of an unconstitutional exercise of the police power as to have been received very doubtfully by many of the most thoughtful constitutional lawyers in the country. To go further would be suicide. For, such legislation could not stand for one moment the constitutional tests to which it would be submitted in any competent court of justice.

Take, for instance, the "poison label" proposition. Its adoption as law would not only not reasonably meet any present public emergency but would actually create a new one, to-wit, it would destroy the public repulsion to the label now in use until it would no longer act as a danger signal. "Imagine," says the Pacific Pharmacist, commenting on the "Mann Bill," "the effect of putting a death's head and crossbones in flaming red on every bottle of ammonia, on all denatured alcohol and compounds made with it, on zinc oxide or its ointment, homeopathic aconite, belladonna, cannabis indica, on bromo seltzer, all combinations, however weak, of acetanilide, or phenacetine, damiana, paregoric, poke root, or jimson weed! Who ever heard of anybody being killed with cannabis indica or injured by cotton root? The bill contains no qualification as to the amount of these so-called

poisons that would call for such labeling, so that a four-ounce cough mixture containing a teaspoonful of paregoric must bear the death's head label if sent out of one state into another. The bill if enacted and closely lived up to would cause so many things to bear the flaming poison label that it would soon lose its distinctive character."

Then, the animus back of this proposed legislation must be recognized. The mere statement of the propositions submitted convey the immediate impression that ulterior motives of a personal nature serve to create the intense earnestness and partisan activity of the medical profession in so insistently demanding their conversion into law by legislative fiat. In the Journal of the American Medical Association of March 4, 1905, objection is made to proprietary medicines on the ground that "they encourage the patient to prescribe for himself, and, as the proprietary manufacturer becomes richer, the physician becomes poorer."

This then is the great emergency, to-wit, self medication by the people at the expense of the doctor's fee! We feel sorry for the doctor, but our utmost commiseration for his financial future would not justify us in considering the situation thus presented as creating any impending danger, threatening the public health and certainly not one which can be said to affect the general public in the security of their possessions.

There are "quack" proprietary remedies as there are "quack" doctors, but certainly neither the medical profession nor the proprietary remedy fraternity should ask that their competitors be utterly cut off or unreasonably restricted in order to get rid of the "undesirables." There are more reasonable methods of getting rid of a pest in the house than to burn the house in an effort to incinerate the pest. So the law in dealing with any emergency is not inclined to destroy legitimate enterprises involving the investment of millions of dollars and which in many cases perform a great public service in order to get rid of some miserable scamp who seeks to impose some useless or deleterious nostrum on the public.

## NOTES OF IMPORTANT DECISIONS.

**ELECTIONS—ILLEGAL SOLICITATION OF CAMPAIGN FUNDS.**—It is surprising how much money the people are urged to contribute to each of the two great political parties in order to prevent the other from securing most of their votes with which to ride into power and to "crush under the iron heel of oppression the rights of the common peepul." Our last clause is the usual peroration of Democratic and Republican orators which we have now come to accept with patient resignation. But patience ceases to be a virtue with us when year after year we are assessed for contributions to convince the other fellow while at the same time the "other fellow" is likewise importuned for funds to convince us. When "we" and the "other fellow," especially if we be office holders, get together, this little one-sided game of chance is declared off and a law is passed prohibiting the solicitation of campaign funds among certain employees of the government.

All such laws are in the interest of a sound public policy and should be liberally construed in favor of the fellow who has spent all his money in obtaining an office and then is asked to mortgage his debts in order to keep it. We commend, therefore, the decision of the United States District Court in the recent case of *United States v. Smith*, 163 Fed. 926.

In this case defendant was indicted under the federal statute for soliciting in the postoffice at Clanton, Ala., a contribution of money for a political purpose from the postmaster. It appeared that defendant was the Republican committee chairman of the county, and that he was conducting a political campaign there. He wrote letters in his office to a number of persons, including the postmaster, soliciting campaign contributions, and after putting them in envelopes, and sealing and addressing them, took them to the postoffice to stamp and mail. While stamping the letters in the postoffice, the postmaster came into the room and spoke to him. Defendant thereupon handed him the letter addressed to him, saying, "This will save a stamp." He took the letter, and defendant, without advising him as to its contents, immediately left the postoffice, not having in any way solicited any contribution except by the

sealed letter. The court held that a verbal solicitation was not necessary to constitute the offense on the ground that the statute forbids the solicitation in "any manner whatever," and, therefore, the solicitation was complete and the statute was violated when the letter was handed to the postmaster.

**CONSTITUTIONAL LAW — INDEFINITENESS IN FIXING THE OFFENSE IN A CRIMINAL STATUTE.**—Against many of our criminal laws the charge of indefiniteness is often made. And in many cases this charge is well founded, until to-day in many states a citizen is not only presumed to know the law but also what the legislation intended to prohibit or what the courts may say the legislation intended. This is very unsatisfactory, but is only exceeded when the legislature adds to this uncertainty the interference of some court's idea determining agency in fixing the crime, so that the citizen must not only know the law or what the legislature intended by the law or what the courts shall say that the legislature intended, but also must know at their peril what the courts shall say that the legislature intended for certain outside organizations to do before the definition of the crime shall be definitely fixed.

This was the situation confronting the Supreme Court of Montana in the recent case of *State v. Holland*, 96 Pac. Rep. 719, which involved the construction of a statute which provided that any person who shall wear or use the insignia or ceremonials of any society, order, or organization of 10 years' standing in the state, unless entitled to use or wear the same under the constitution or regulations of such organization, shall be guilty of a misdemeanor. Appellant contended that this law was unconstitutional as it enabled the organization to fix the offense, thus delegating to it the exercise of powers rightfully belonging to the legislature. Thus a citizen was unable to ascertain from the statute what he was prohibited to do, but had to gain such information from the regulations of a secret society which were closed to him. To avoid the penalty of the statute he had to keep himself posted as to the changes in such societies. The Supreme Court of Montana held that as the legislature declared the prohibition and provided the penalty for its violation, but left it to the societies to supply the description of the violated ritual, the statute was unconstitutional.

FURNISHING FOR SERVANT'S USE  
ARTICLE IN GENERAL USE AS  
MEASURE OF MASTER'S DUTY.

Opinion is irreconcilably divided upon the question whether or not a master, in furnishing appliances for his servant's use, has fulfilled his duty in that regard by furnishing those which are ordinarily used in the business.

Perhaps a majority of the courts have adopted a rule which may be thus expressed: Where the only inference that can reasonably be drawn from the evidence is, that the master has conformed to the general usage of the business in respect to furnishing instrumentalities for the servant's use, he should, as a matter of law, be declared to have been in the exercise of due care, and accordingly guiltless of negligence. Other courts refuse to agree with this proposition, and have declared that the custom shown must be the custom of *well regulated* and *prudent* concerns.

Other courts, and this would seem to be better founded in reason and justice, have declared the correct rule to be that the mere fact that the instrumentality in question has been commonly adopted by employers in the same business is not conclusive upon the question of negligence, though it is a circumstance to be considered in determining that question. Mere usage, these courts say, should not be permitted to establish that that which is in fact unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to exercise due care. That is to say, if the custom itself is negligent, it is not to be considered an excuse. That proof of a custom in well regulated concerns may be proven as tending to prove that due care was exercised in the particular instance, but that it is not conclusive upon the question and is to be considered by the jury, along with the other evidence, in determining the question of negligence or lack of negligence upon the part of the master.

Considering the first doctrine, that compliance with usage is conclusive of the lack of negligence on the master's part, we find the rule expressed in language, which if taken literally, would imply that the generality of the usage and the similarity of the business are the only points to be considered, and that the manner in which the business is conducted, and the character of the persons engaged therein are not material.

A leading case upon this question is *Titus v. Bradford, B. & K. R. Co.*,<sup>1</sup> which was an action for the death of a brakeman and in which the negligence charged was the use of a broad gauge car body upon a narrow gauge truck. The court in discussing the duty of a master as to articles furnished for the servant, used the following language: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe,' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsi-

(1) 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517.

bility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." And in *Demers v. Marshall*,<sup>2</sup> in which it appeared that the plaintiff was injured by his clothing catching in a set screw, the court, in declaring the defendant free from negligence, said that, although it appeared that the projecting set screws had been going out of use on account of safer substitutes, and had not been commonly used in establishments lately constructed, the evidence fell short as a whole of showing that they were not still commonly used for holding collars and pulleys on the shaft, and were not a well-recognized device for that purpose. In *Bohn v. Chicago, R. I. & P. R. Co.*,<sup>3</sup> in which it appeared that the injury sued upon was caused by the breaking of a prize pole which the plaintiff and other servants of the defendant were using to raise a broken turntable, the court said: "No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business." In *Worheide v. Missouri Car & Foundry Co.*,<sup>4</sup> in which it appeared that the plaintiff's injuries were received while employed in defendant's car shops, and were caused by the tipping over of two loaded trestles, the court said that a master was under no obligation to reject all appliances employed by him at once, because others were employing appliances safer in construction; and that much less was he required to do so when it was shown that similar appliances to his were used in similar establishments, and it was not shown that other and better appliances were in common use. In *Tompkins v. Marine Engine & Mach. Co.*,<sup>5</sup> in which the plaintiff received his injuries while setting a tool in a rail planer which he operated, and the negligence alleged was the fur-

nishing him a steel hammer for the purpose, the court said: "The steel hammer clearly appearing by the testimony to have been in common and ordinary use in the adjusting of the tools in the planer, the defendant in no wise failed in his duty to the plaintiff by its use." For cases to the same effect see those cited in the note.<sup>6</sup>

As to the second doctrine mentioned above, namely, that proof of a custom in *well-regulated* and *well-conducted* concerns is necessary to show conclusively that there was a lack of negligence on the master's part and that mere proof of custom is not sufficient, the following cases may be noted. In *Briggs v. Chicago & N. W. R. Co.*,<sup>7</sup> in which the plaintiff alleged that her intestate, a fireman, had been killed through the negligence of the railroad company in failing to furnish a certain locomotive with a suitable pilot, it is said to be a general rule that a railroad company was not required to use upon all of its cars the safest possible appliances, or those of the latest and most approved pattern, but was at liberty to make use of such appliances as were at the time in general use on other *well managed* railroads, and were of the kind regarded as reasonably safe; and the court refused to find the defendant guilty of negligence where it appeared that pilots, such as the locomotive in question was equipped with, were in general use, and were the only ones that could be successfully employed under the conditions in which this engine was used. So, in *Georgia P. R. Co. v. Probst*,<sup>8</sup> in which it appeared that the plaintiff, a brakeman, received his injuries while coupling cars, it was held that, if the coupling appliances used by the defendant were such as were employed by many *well-conducted* roads, this would repel all im-

(2) 178 Mass. 9, 59 N. E. 494.

(3) 106 Mo. 429, 17 S. W. 530.

(4) 32 Mo. App. 367.

(5) 70 N. J. L. 330, 58 Atl. 393.

(6) *Wabash Screen Door Co. v. Black*, 126 Fed. 721; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; *Sappenfield v. Main Street & Agri. Park R. Co.*, 91 Cal. 48, 27 Pac. 590; *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Carey v. Boston & M. R. Co.*, 158 Mass. 228, 33 N. E. 512; *Shadford v. Ann Arbor R. Co.*, 121 Mich. 224, 80 N. W. 30.

(7) 125 Fed. 745.

(8) 83 Ala. 518, 3 So. 764.

putation of negligence, though other roads, "even a majority of them," adopted a different pattern. In *Chicago & G. W. R. Co. v. Armstrong*,<sup>9</sup> in which the plaintiff, a brakeman, was injured by falling from a moving train, due, as was alleged to the fact that a hand-hold of a freight car was placed the wrong way, the court refused to find the railroad guilty of negligence where it was shown that hand-holds running the same way as the one in question were in common use. The rule was laid down that a reasonably safe method of the construction of cars meant one safe according to the uses, customs and ordinary risks of the business; that an employer was obliged only to conform to the rules and uses which *prudent* and *careful* men had established in the conduct of a similar kind of business under similar circumstances. The same rule was held to obtain in *Boyle v. Union Pac. R. Co.*,<sup>10</sup> in which the plaintiff was injured, as alleged, through the inefficiency of a brake on the car, the rule was expressed in the following language: "The master is required to supply the same kind of appliances, or appliances equally as safe, as those in general use by men of *ordinary prudence* who are engaged in the same kind of business."

If the master is to be excused from negligence by furnishing for his servant's use appliances which are ordinarily used in the same business, or in *well managed and well regulated* concerns, under similar circumstances, it would seem that the converse of this proposition would be true, though it does not appear to the writer that either is sound, and the master be held negligent if he fails to furnish such instrumentalities as are in general use. In the cases discussed in the succeeding paragraph, such conclusion was reached.

In *Richmond & D. R. Co. v. Jones*<sup>11</sup> in which the negligence alleged was the furnishing of a defective drawhead in the ten-

der of a certain locomotive, the court used the following language: "It is the duty of railroads to keep themselves reasonably abreast with improved methods so as to lessen the danger attendant on the service, and while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances." The same was held in *Richmond & D. R. Co. v. Weems*,<sup>12</sup> in which the negligence alleged was that a gudgeon pin in a derrick, by the breaking of which a plaintiff was injured, was too small, it was held that it would be negligence on the part of the defendant if a pin of the size of the one in question was not used by many well-conducted businesses of that kind under like circumstances. In *Sparks v. River & Harbor Improv. Co.*,<sup>13</sup> in which the negligence alleged was in furnishing a certain valve on an engine, the defendant was held negligent in that he provided a valve which was not in common and ordinary use. So, in North Carolina it has been held that the failure of a railroad company to furnish automatic car couplers was negligence *per se*, which rendered such a company liable to an employee for injuries received in attempting to couple cars not so equipped.<sup>14</sup> In *Bennet v. Northern P. R. Co.*,<sup>15</sup> in which the plaintiff was injured while coupling a car to a locomotive, by being squeezed between the two, owing to the shortness of the drawbars, the court declared the jury justified in holding the defendant negligent when the evidence showed that each of the drawbars was much shorter than those in common use. So, in *Cosselman v. Dunfee*,<sup>16</sup> in which the negligence alleged was the failure of the defendant to furnish a sufficiently strong hook to hold the bucket

(9) 62 Ill. 228.

(10) 25 Utah, 420, 71 Pac. 988.

(11) 92 Ala. 218, 9 So. 276.

(12) 97 Ala. 270, 12 So. 186.

(13) 74 N. J. L. 818, 67 Atl. 600.

(14) *Greenlee v. Southern R. Co.*, 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115; *Troxler v. Southern R. Co.*, 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550.

(15) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408.

(16) 172 N. Y. 507, 65 N. E. 494.

used on a derrick, one of the elements relied upon in finding the defendant guilty of negligence was that the hook in general use for such purposes was larger. To the same effect see *McGar v. National & P. Worsted Mills*.<sup>17</sup>

In the following cases, all of which are from jurisdictions in which the rule is that a master will not be held to be negligent if he furnishes for his servant's use instrumentalities generally used by other employers in the same business, the court merely held that evidence that the machinery used by the defendant was not such as was ordinarily used by other employers was admissible to show that the employer was negligent, but did not go to the length of holding it conclusive upon that question; though it does not appear from the opinions that such question was raised in the cases.<sup>18</sup> In *Wabash Paper Co. v. Webb*,<sup>19</sup> the court said: "The jury find, as the evidence also shows, that the paper mill and machinery were constructed and maintained after approved plans, of good pattern and design, of good material, adapted to the use for which they were intended, and such as are in use in the best paper mills. It is possible that the gearings, set-screws, pulleys, belts and other such exposed parts of machinery might be rendered more safe by being boxed. But well conducted mills are operated without this extra care; and if usual and ordinary care is shown in the procurement and maintenance of machinery that is all that can be asked." The court held that as a matter of law the plaintiff was guilty of contributory negligence.

Some of the courts follow the third doctrine outlined and refuse to hold it conclusive of the master's lack of negligence if he supplies the ordinary instrumentalities, and have adopted the doctrine, which

is more in consonance with our institutions, that such fact is mere evidence to be considered by the jury in determining whether or not the master has fulfilled his duty towards his servant in furnishing him appliances for his use. The court in *Monson v. Crane*,<sup>20</sup> said: "An employer is not as a matter of law negligent if he fails to adopt every new device or apparatus which is recognized as a proper improvement upon his machine. It is for the jury to determine whether the particular instrumentality, in the condition in which the evidence shows it to be, is or is not reasonably safe, and, to aid them in determining this fact, they have the right to consider whether there are well known devices in general use, which, if adopted, would have reduced the danger to the employee. It is not the employer's duty to furnish any particular kind of tools, implements or appliance. Failure to conform with common usage is not negligence as a matter of law. It is merely to be considered by the jury. He is not required to provide machinery similar to that used in other establishments, although it may be less dangerous than that used by him. Whether that which is furnished by him is reasonably safe is to be determined by its actual condition, and not conclusively by comparing it with other machines used by others for similar work." To the same effect, see *Stiller v. Bohn Mnfg. Co.*<sup>21</sup>

This rule necessarily leads to the conclusion that the fact that the appliance is in general use throughout the country in the same or similar lines of work is not conclusive upon the question of negligence if in fact the master has not used proper care in its selection and it is not reasonably safe. In *Anderson v. Fielding*,<sup>22</sup> the court said: "The law of this state is that a negligent act will not be excused by the fact that it is customary. Proof of custom, however, is evidence, but not conclusive as to whether the act is negligent. This

(17) 22 R. I. 347, 47 Atl. 1092.

(18) *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Anderson v. Ill. C. R. Co.*, 109 Iowa, 524, 80 N. W. 561; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Belleville Stone Co. v. Comben*, 61 N. J. L. 353, 39 Atl. 641. Affirming 62 N. J. L. 449, 45 Atl. 1090.

(19) 146 Ind. 303.

(20) 99 Minn. 188, 108 N. W. 934.

(21) 80 Minn. 1, 82 N. W. 981.

(22) 92 Minn. 42, 104 Am. St. 665, 99 N. W. 357.

rule applies to the act of selecting and furnishing tools and appliances for the use of employees."<sup>23</sup> General custom is not as a matter of law due care.<sup>24</sup> As said by Mr. Justice Holmes: "What usually is done may be evidence as to what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."<sup>25</sup> The master is not, therefore, required to adopt every new device by way of improvement upon the appliances furnished by him to his men. It is sufficient if such as are supplied are reasonably safe. But, as said in *Hoy v. Chicago, M. & St. P. R. Co.*,<sup>26</sup> "Reasonable care is all that is required. But this must be proportionate to the risks to be apprehended and guarded against." The degree of care must be commensurate with the dangerous character of the article, the circumstances under which it is used, and the seriousness of the dangers to be anticipated. Reasonable care may thus under certain circumstances be the highest degree of care.<sup>27</sup> The Indiana Supreme Court said in *Lake Erie & W. R. Co. v. Mugg*,<sup>28</sup> that: "Ordinarily, a master will not be permitted to show, as a defense to an action by an employee for not furnishing reasonably safe or suitable machinery, or a reasonably safe place for its employees to work, that it was the general or universal custom of other masters to furnish defective implements, or an unsafe place to work." It does not appear why it should ever be permitted. The Indiana courts attempt to distinguish and hold that some cases are for the jury and other cases for the court to decide. In *Baltimore & Ohio, etc., R. Co. v. Leath-*

*ers*,<sup>29</sup> the court said: "It is the duty of the master to provide his servants with reasonably safe places in which to work, and suitable and reasonably safe appliances with which to work. Nor can the courts as a general rule determine what particular form or kind of machinery and appliances, or the manner of their construction, which the master must provide for his servants. There may be cases in which the court may rule as a matter of law that certain appliances and the manner of their construction are reasonably safe or unsafe, and that the master is or is not negligent in providing them. But between these two extremes there is a large number of instances in which the negligence or want of negligence of the master in providing given appliances is a question for the jury." A leading case holding that it is a question for the jury is *Geno v. Fall Mountain Paper Co.*,<sup>30</sup> in which it appeared that the plaintiff received his injuries by having his clothing caught in a set-screw. It was held that the fact that the appliance was in common use tended to show that the master was not guilty of negligence in providing it for the use of his employees, but was not conclusive upon that proposition. The proper test was said to be, Would a reasonably prudent man furnish it under the circumstances? To quote from the opinion: "The doctrine of 'common use,' 'the ordinary usage of the business,' as one of general application, we are not inclined to adopt, though it might apply to the facts in a given case. We think the more reasonable rule is to require the employer, in the selection and setting of machinery, to use the care of a prudent man in like circumstances. If a machine or appliance were not such as would commend itself to the judgment of a prudent man, and an injury occurred from its use, it ought not to be a defense to say that it is one of a kind in common use. It cannot always be assumed that machines in common use would meet the approval of prudent men. They might remain, and often do

(23) *Craver v. Christian*, 36 Minn. 413, 1 Am. St. Rep. 675, 31 N. W. 457; *Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373; *Attix v. Minn. Sandstone Co.*, 85 Minn. 142, 88 N. W. 436.

(24) *Wabash R. Co. v. McDaniel*, 107 U. S. 454, 2 Sup. Ct. Rep. 932.

(25) *Texas & P. R. Co. v. Behymer*, 189 U. S. 470, 23 Sup. Ct. Rep. 622.

(26) 46 Minn. 269, 48 N. W. 1117.

(27) *Wilta v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169.

(28) 132 Ind. 168.

(29) 12 Ind. App. 544, 548.

(30) 68 Vt. 568, 35 Atl. 475.

remain, in such use when they ought to have been superseded by others of an approved pattern. It would hardly be a defense for an employer to say that a certain machine upon which an employee had been injured was one of a kind in common use, if the employer was compelled, as a prudent man, to admit that it was, in his own judgment, dangerous." In *Bean v. Oceanic Steam Nav. Co.*,<sup>31</sup> in which it appeared that the plaintiff was injured because of the defectiveness of a winch used in discharging a cargo from the hold of a steamer, the defendant contended that an employer's liability in regard to appliances furnished for his servant's use depended upon the fact whether they were approved or customary ones, and whether they had received the general sanction of employers, and had answered the purposes which they were designed to accomplish; but the court said that the requisites of ordinary care were not satisfied by such a rule; and quoted from *Wabash R. Co. v. McDaniels*,<sup>32</sup> to the effect that ordinary care on the master's part implied, as between it and its employees, not simply the degree of diligence which is customary among those engaged in the same line of business, but such as, having respect to the exigencies of the particular service ought reasonably to be observed. And in *Martin v. California C. R. Co.*,<sup>33</sup> in which it appeared that the plaintiff's intestate, a brakeman had, met his death while coupling cars, due, as was alleged, to a defective coupling, it was held that, while evidence that the coupling in question was of the kind in general use among railroad companies would tend to show ordinary care in the selection of the coupling, it was not conclusive of that question. So, *Hosie v. Chicago R. I. Co. & P. R. Co.*,<sup>34</sup> in which it appears that the plaintiff, a brakeman, was injured in passing over a car loaded with farming implements, and which had no footboard for

passageway over its load, it was claimed by the defendant that it was not customary at that time, and never had been, to place foot boards on cars so loaded. The court said that, inasmuch as the jury must have found that the defendant was negligent in not providing a foot board for the car in question, the fact that such negligence was usual or customary would not relieve the defendant from liability. There are many well reasoned cases which may be cited supporting the last mentioned doctrine, which seem to be well founded in principle.<sup>35</sup>

GEORGE W. PAYNE.

Indianapolis, Ind.

(35) *Louisville & N. R. Co. v. Jones*, 130 Ala. 456, 30 So. 586; *Goins v. Alabama Steel & Wire Co.*, 141 Ala. 537, 37 So. 784; *Davis v. Kornman*, 141 Ala. 479, 37 So. 789; *Croker v. Pusey & J. Co.*, 3 Penn. 1, 50 Atl. 61; *Sawyer v. J. M. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Lowmore v. Palmer Mfg. Co.*, 60 S. C. 153, 38 S. E. 430; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.

#### GAMING—VALIDITY OF NOTES GIVEN FOR GAMING OBLIGATIONS.

BURKE v. BUCK.

Supreme Court of Nevada, Feb. 20, 1909.

The common law having been adopted in the state, under the common law as to gaming obligations, as modified by St. 9 Anne, c. 14, as found in 4 Bac. Abr. p. 456, making all bills, securities, etc., given for money advanced during gaming or playing cards, etc., to any person playing, void, a transfer of a certificate of deposit, indorsed during a game of chance, to enable the indorser to secure funds to continue the game, was void, so that the transferee acquired no title, and could not recover thereon as against the indorser.

**SWEENEY, J.:** This is an appeal from a judgment, and from an order denying a motion for a nonsuit. The action was originally brought by the plaintiffs against John S. Cook & Co., a banking institution, to recover the amount of \$500 upon a certain certificate of deposit of date May 25, 1907, issued by said banking institution and payable to the order of Hamilton Buck, defendant above named. The complaint further alleged: "That on or about the 29th day of May, 1907, the said Hamilton Buck sold, assigned, and transferred to these plaintiffs, by proper and legal indorse-

(31) 34 Fed. 124.

(32) 107 U. S. 454, 2 Sup. Ct. Rep. 932.

(33) 94 Cal. 326, 29 Pac. 645.

(34) 75 Iowa, 683, 37 N. W. 963.

ments, all his rights, title, and interest in and to said promissory note or negotiable certificate of deposit in writing; that on or about the 31st day of May, 1907, the plaintiffs presented said promissory note or negotiable certificate of deposit to the said defendant, and demanded payment thereof; that the said defendant then and there refused to pay the said \$500, or any part thereof, and still so refuses to pay these plaintiffs the said sum." The defendant John S. Cook & Co. appeared in the action, and filed a petition, setting forth that the said Hamilton Buck had on the 25th day of May, 1907, deposited in the bank the sum of \$500 in return for which the certificate in question had been issued to him; that on the 30th day of May, 1907, the said Hamilton Buck notified the defendant bank that he had parted with said certificate of deposit, and that the same was in the possession of the plaintiffs, or some other person, but that they were not legally entitled to such possession, nor the ownership of the said certificate of deposit, and not to pay the same to the plaintiffs, or any one except the said Hamilton Buck, and that thereupon payment to plaintiffs was refused. The defendant bank, not claiming any right, title, or interest in the said certificate except as aforesaid, was upon motion permitted to pay the same into court, and the said Hamilton Buck substituted as defendant in the action. The said defendant Hamilton Buck filed an answer to the complaint of plaintiffs, containing the following denials and allegation: "That he denies that on or about the 29th day of May, 1907, he sold, assigned, and transferred to the plaintiffs, by proper and legal indorsements, all his rights, title, and interest in and to the said note or certificate of deposit, in writing. Further answering, the defendant says that the plaintiff got possession of said certificate of deposit by fraud and without consideration, and by plying the defendant with intoxicating liquors until he was incapable of understanding, and unable, from the use of intoxicating liquors so supplied to him by plaintiffs, to comprehend or understand the effect of what he was doing, when he parted with possession of the said certificate of deposit which the plaintiffs now hold and keep from him." Thereafter, by leave of court, defendant Buck filed an amendment to his answer reading as follows: "That if there was any purported consideration for the indorsement and transfer of the certificate of deposit mentioned in the complaint herein from him to the plaintiffs in this action the same was and is an illegal consideration, and one that is against public policy, viz., that while this defendant was so intoxicated and under the influence of

liquors, as hereinbefore stated, he gambled at a game of chance then being conducted, operated, owned, and managed by these plaintiffs, in and at a certain saloon known as the 'Texas' saloon, at Goldfield, Nev., which said game of chance is commonly known as and called 'roulette,' and if this defendant indorsed, or in any manner transferred, said certificate of deposit to these plaintiffs, the same was done to pay for money he had lost while so gambling with these plaintiffs, or was done to obtain money with which to continue to gamble and play with these plaintiffs at said game of roulette at their saloon and gambling house at Goldfield, Nev. If said certificate of deposit was transferred to said plaintiffs, or either of them, it was only done by this defendant for said purpose, and none other, and was done with full knowledge of said plaintiffs of such purpose, upon the part of this defendant, and to furnish him with money with which to continue to gamble with them at their said game of roulette, and if any money or other consideration ever passed from either of the plaintiffs in this action to this defendant, it was only given that said game might be continued, and with a full knowledge of the intended use of the same by this defendant, and was only so given with the belief and intent, upon the part of said plaintiffs, to win the said certificate of deposit, and the money it represented, from this defendant by reason of his said intoxicated condition, and knowledge that he intended then and there to use the same to play at the said plaintiff's game of roulette." Upon the issues thus made by the foregoing pleadings, the parties went to trial. Upon the conclusion of the testimony offered by the plaintiffs, counsel for defendant interposed a motion for a nonsuit. The motion being overruled, and the defendant not offering any evidence, judgment was entered against him for the amount demanded in the complaint.

The evidence upon the part of the plaintiffs, without conflict, shows the following state of facts: On the evening of the 29th day of May, 1907, the defendant Buck was in a saloon in the town of Goldfield called "The Texas," in which the plaintiffs conducted the gambling game called "roulette." In charge of the game or "wheel" was one Charles Green, a brother of one of the plaintiffs. For about two hours prior to the indorsement of the certificate of deposit in question the defendant Buck had been "playing the wheel" with varying fortune, until he had finally lost about \$1,000. After losing this amount of money he indorsed the certificate of deposit in question, and gave it to the dealer, who placed it in the drawer of the roulette table. The certificate

was indorsed upon the roulette table with a pen furnished by one of the plaintiffs. Upon the indorsement and delivery of the certificate of deposit there was paid to defendant Buck, upon the said table, the sum of \$500 in gold coin, from moneys then being used in the game. At the time defendant Buck indorsed the certificate of deposit the dealer testified that Buck "did not seem to have any more money," but that he was not indebted to the plaintiffs. After the indorsement and delivery of the certificate of deposit, defendant Buck continued to play the game. The dealer testified that "he won for quite a while; won \$700 or \$800 after he cashed the check, and finally he lost it—lost the amount practically of the check." The dealer later testified that he did not think defendant lost over \$400 of the amount of the certificate. One Cowell, a bartender in the Texas saloon, testified to having seen the defendant Buck "playing the wheel," and saw him indorse the certificate, and receive therefor \$500 in gold. Upon the question of the furnishing of intoxicating liquor to the defendant we quote from the testimony of this witness as follows: "Q. Where were you at the time this cashing of the instrument was done? A. Serving an order of drinks at the table. Q. At the roulette table? A. Yes, sir. Q. A round of drinks had been ordered by somebody? A. Ordered by the game. Q. Does the game order drinks for the patrons? A. Yes, sir. Q. And gives them liquor? A. Anything they want. Q. Whatever they want; if they want whisky or liquor, or anything, the house furnishes it to them? A. Yes, sir. Q. And they repeatedly at the roulette table, in the course of the evening, call for drinks, don't they? A. Yes, sir; if anybody wants a drink, they ask the dealer to ring the bell. Q. And the dealer rings the bell, and gives them all they want to drink, free of expense? A. Yes, sir. Q. That was the condition of affairs there that night at the time of the cashing of this certificate of deposit? A. Yes, sir. Q. Do you recall serving him any drinks? A. Yes, sir. Q. What did you serve him, what did he drink? A. I think he was drinking Scotch highballs. Q. That means Scotch whisky and something else? A. And mineral water." The foregoing comprises all the material facts presented at the trial.

The contention of counsel for appellant is stated in their brief as follows: "That this transaction is against public policy. That the indorsement was without legal consideration, and hence void, and in law vested no title to this paper in plaintiffs, and that having been given in a gambling or gaming transaction, and for such purpose solely, the nonsuit should have been granted." The law is

well settled in this state, as it is in most, if not all, of the states, that it is a good defense to an action upon a negotiable instrument to show that the consideration for which it was given was money won by gambling. This question first came before this court in the case of *Evans v. Cook*, 11 Nev. 69, in which case this court, by Beatty, J., said: "Is it, then, a good defense to an action on a promissory note to show that the consideration for which it was given was money won by gambling? As to whether contracts of wager in general were valid at common law, there is some conflict of opinion disclosed by the American cases, but the weight of authority is so decidedly in favor of their validity that I think there ought never to have been a doubt of it. The ancient common law, however, was altered in respect to this matter by numerous English statutes, and it has been held by this court that English statutes, in force at the date of the declaration of American independence and applicable to our situation, are a part of the common law which we have adopted. *Ex parte Blanchard*, 9 Nev. 105. I should have felt some hesitation in coming to this conclusion if the matter had been *res integra*; but I think that, after having been once so determined, the point should not be unsettled, except for very weighty and conclusive reasons, and none such have been suggested in this case. It follows, therefore, that we have adopted the common law upon the subject of wagers as altered by the statute of 9 Anne, c. 14, by the first section of which it is enacted 'that all notes, bills, bonds

\* \* \* given \* \* \* by any person or persons whatsoever, where the whole or any part of the consideration \* \* \* shall be for any money or other valuable thing whatsoever, won by gaming, \* \* \* shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever,' etc. 4 Bac. Abr. 456. This, then, is the law of this state, except so far as it may be controlled by our own statutes; and there is nothing that I am aware of in the laws of Nevada to limit its operations, except for the protection of a bona fide assignee for value of a note or bond, which the statute of Anne makes absolutely void." In the foregoing decision, the learned judge, now Chief Justice of the Supreme Court of California, only quoted such portion of the statute as was applicable to the case then under consideration. The statute, however, is much more comprehensive than is indicated in the opinion of Beatty, J., quoted from, and reads as follows: "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any

person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." 9 Anne, c. 14, 4 Bac. Abr. p. 456. In view of the evidence disclosed in this case, which shows that this assignment was made at a gaming table, and during the progress of the play, it comes squarely within the statute, above quoted, and therefore the consideration is, by the specific terms of the statute, "utterly void, frustrate and of none effect." See, also, *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; 20 Cyc. 939, 940.

In the case of *Scott v. Courtney*, 7 Nev. 419, which was an action to recover the sum of \$2,100 won at a game of faro in a public gambling house, this court, in denying the right of recovery, by Lewis, C. J., said: "Is money won at a public gaming table recoverable by action in this state? Is the only question raised upon the record. We conclude it is not. \* \* \* At common law all public gaming houses were nuisances, not only because they were deemed great temptations to idleness, but also because they were apt to draw together great numbers of disorderly persons. 4 Bac. Abr. 451. It would therefore seem to follow that money won in such house by the keeper could not be recovered, because everything connected with or growing out of that which was illegal partook of its character, and was tainted with its illegality. So gaming, which might be innocent itself if carried on elsewhere, would become illegal by being conducted in a place which was condemned by the law. This is an undoubted principle, applicable, not only to cases of this nature, but all cases of analogous character. \* \* \* Does the statute of this state, then, licensing gaming change the old law in this respect? We think not. The statute does not pretend to do more than to protect the keepers of public gaming houses from criminal prosecution when a proper license is procured. Section 2, declaring that, 'The said license shall protect the licensee and his employee or employees against any criminal

prosecution for dealing and carrying on the game mentioned, thus appearing to restrict the effect of the license to simple protection of the persons engaged against punishment, and leaving gaming houses in all other respects precisely as they were formerly, civilly subject to all the disapprobation and restrictions of the common law."

The statute making void a transfer of a negotiable instrument at the time and place of such play, to any person so gaming, or during such play, and the facts of this case showing that the certificate of deposit in question was transferred during the progress of the play at such a time and place, no valid transfer of the certificate was effected, and hence the plaintiffs acquired no legal title thereto.

The judgment of the lower court is reversed, and said court is ordered to enter a judgment in favor of the defendant, to the effect that he is entitled to the money now on deposit with the clerk of said court in said cause.

NORCROSS, C. J., and TALBOT, J., concur.

NOTE—*The Common Law of this Country as to Gambling Debts*.—There appears in Vol. 53 of this Journal at page 431, quite a thorough annotation of the subject "Validity of Loans for Gambling Purposes," that the going over of this same thing appears to us to be a work of supererogation. The principal case we are here annotating suggests however, other lines of annotation than that expressed above and invalidity from the general standpoint of gambling contracts being *contra bonos mores*. It is perceived from the opinion in the principal case that Nevada statutes do not touch upon gambling transactions directly, but incidentally only in protecting "a bona fide assignee for value of a note or bond which the statute of Anne makes absolutely void." Our first subject for annotation is whether or not the English statutes on gambling, in force at the date of the declaration of American Independence, or the prior common law on this subject, became a part of our common law. Ex parte Blanchard cited in the opinion taken from the Evans Case, did not hold directly that the statute of Anne was a part of our common law, but that 10 and 11 W. III. c. 17, declaring all lotteries to be public nuisances was, because it "remained in force in England at the time of the Declaration of Independence and being applicable to our situation constitutes part of our common law." From that it is deduced that the statute of Anne also was part of our common law, and this conclusion is approved by the principal case. The Blanchard case did not seem to require the ruling adverted to by the Evans case as the question there was whether a certain act authorizing a scheme for a charitable purpose was unconstitutional under a clause that "no lottery shall be authorized by this state." At most the common law could only be looked to for a definition of the term "lottery." An early case in South Carolina, *Hasket v. Wootan*, 1 Nott & McC. 180, considered that the statutes, 16 Car.

and 9 Anne as part of our common law, and deduced therefrom that wagers are not illegal merely as wagers, as both of these statutes excepted wagers under £10 and provided for the recovery of sums in excess of £10 provided they be sued for within three months. In *Harris v. White*, 81 N. Y. 532, 541, the New York Court of Appeals made no reference to either of these statutes in arguing as to the construction to be placed upon gambling statutes of that state respecting horse races in saying that: "It was not illegal at common law to make a bet or wager on a horse race and an action to recover a wager won has been maintained. *McAllester v. Haden*, 2 Comp. 438; *Blanton v. Pye*, 2 Wils. 309." And this court assumed that an employment of a driver for race horses was legal where the service was to be performed in other states in the absence of any showing that the common law on this subject had been superseded by statutory provisions. It must be remembered that the statute, 16 Car. II., was aimed especially at horse racing. The case of *Appleton v. Maxwell*, which was that annotated in 53 C. L. J. 431, supra, says: "At common law certain wagering contracts were held valid and the early English precedents sustained such contracts with few exceptions. Some of the American courts followed the early English precedents, but while these early English precedents were, in many instances, followed, regret was expressed on the part of some of the judges and they felt constrained, out of respect for precedent, to sustain such doctrine. After the enactment of the statutes Charles II. and 9 Anne the doctrine announced by the English courts based upon these statutes was entirely different from that announced in the early cases." But if these statutes were part of our common law, as the principal case holds, why should any American court since the Declaration of Independence have been constrained by the early English precedents? It could only have been because these statutes were not regarded as part of our common law. The *Appleton* case also approved the case of *Wilkinson v. Tousley*, 16 Minn. 299. That case quotes *Parker, J. in Amory v. Gilman*, 2 Mass. 6, as repudiating the early common law doctrine, no reference being made to the statutes of Charles II. and Anne and cases from Vermont, New Hampshire and Connecticut as doing the same thing, all of which would have been unnecessary if those statutes were considered to be a part of our common law. It was held in an early case in Pennsylvania, *Pritchett v. Ins. Co.*, 3 Yeates 458, decided in 1803, that the British statute of 19 Geo. II., c. 37, enacted in 1746, against wagering policies of insurance did not bind us *ex proprio vigore*, as that was in furtherance of a national policy, and it may have been thought for some like reason that other anti-wager statutes were similarly designed.

*The American Doctrine of Invalidity as Against Public Morals.*—The case of *Pritchett* was said by Sergeant, J., in *Edgell v. McLaughlin*, 6 Whart. 176, to have been ruled that "wagers were considered contrary to its (Pennsylvania's) genius and policy." In *Brua's Appeal*, 55 Pa. St. 204, it was said this principle has never been departed from in that state. In a still later case it was said: "Although not prohibited by statute, a wagering or gambling transaction in stocks, grains, oil or other commodities is unlawful in

this state. A gambling agreement, being in violation of law and in the nature of a public wrong has no legal effect." *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. 922, 60 Am. Rep. 354. This announcement is based on authority coming down from the *Pritchett* case that gambling "is reprobated by our law." In *Bernard v. Taylor*, 23 Oreg. 416, 31 Pac. 968, 18 L. R. A. 859, it was claimed that wagers were valid in Oregon and valid by force of the common law, except when prohibited by express statute, and it was said by the court: "There can be no doubt that wager contracts upon indifferent matters were valid at common law." English authority being cited. Then the court goes on to say: "Of late years by legislation and judicial decision, the hostility to wagers of every nature has been marked." and American decision is quoted in proof of this statement, the court concluding by saying: "Wagers are inconsistent with the established interests of society, and in conflict with the morals of the age; and as such are void, as against public policy. In view of these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this state." In Colorado the court appeared to think parties to such contracts had no claim on courts, it being said: "If we enter upon the work of settling bets made by gamblers in one case, we may despair of ever finding time for the dispatch of those weightier matters which affect the person and property rights of the respectable people of this territory. *Eldred v. Malloy*, 2 Colo. 332.

The viewpoint of the court regarding wagers is thus seen to be very important. Even under the statutes Charles II. and Anne, wagers seem not unlawful *per se*, as they admitted lawfulness within certain limits, while the ancient common law placed no restriction on amounts. Therefore our common law admitted their not being inconsistent with public policy, and statutes in derogation of common law would be construed according to a familiar canon. If the Pennsylvania rule, followed in other states, obtains, these statutes will have applied to them the same kind of interpretation as other statutes, whether enacted from a penal or contractual standpoint.

Taking as the test for our common law such common and statute law of England as was not inapplicable to our condition at the time of the declaration of American independence, and it would seem about as difficult to imagine horse racing and other gambling acceptable to our Puritan and Quaker descendants as that blue laws are appropriate to this age whatever might be supposed as to the so-called cavalier colonies. But if a thing like gambling was in fact abhorrent to a large part of the population of the new confederation of 1776, it should scarcely be called the common law of any part, especially as to a state that gets its common law by statutory adoption.

N. C. COLLIER.

## HUMOR OF THE LAW.

"Your dead husband wor a good mon," declared the sympathetic Mrs. Casey to the bereaved widow.

"He wor!" exclaimed Mrs. Murphy, dashing the tears from her eyes. "No two polacemin cud handle him."

## WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

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1. **Accident Insurance**—Varying Terms of Policy.—In the absence of fraud or misrepresentation, an accident insurance policy limiting the right of recovery to the loss of both eyes cannot be varied by showing that the intention or understanding of the insured was that there was to be a recovery for the loss of one eye.—*Phillippy v. The Homesteaders*, Iowa, 118 N. W. 880.

2. **Adultery**—Instructions.—In a prosecution for adultery, an instruction held not objectionable as misleading the jury to believe that a conviction would be authorized if two acts of intercourse were proved.—*Mabry v. State*, Tex., 114 S. W. 378.

3. **Adverse Possession**—Color of Title.—Patent issued upon a location and survey made subsequent to a subsisting survey and location held void and not to serve as color of title to support a three years' limitation.—*Keith v. Guedry*, Tex., 114 S. W. 392.

4. **Appear and Error**—Who May Complain.—Counsel for executors has no right to be heard against decree below, in action involving construction of testamentary trust, where his clients have not appealed.—*Fitchie v. Brown*, U. S. S. C., 29 Sup. Ct. 106.

5.—**Defective Record**.—Where the record fails to show which party is appellant, or that a judgment was rendered, or that notice of appeal was given, the case will be stricken from the docket.—*Saar v. Carson*, Iowa, 118 N. W. 1007.

6.—**Harmless Error**.—In an assault and battery case, where a direction of an Indian agent under which defendant claimed justification, if it justified the assault, was unreasonable as matter of law, the submission of the question of its reasonableness was not prejudicial to defendant.—*Deragon v. Sero*, Wis., 118 N. W. 839.

7.—**Injunctions**.—A district judge is not absolutely required to grant a suspensive appeal from a judgment dissolving an injunction, but may refuse it, subject to the right of the party to resort to the Supreme Court for a mandamus.—*Le Blanc v. Michel*, La., 47 So. 632.

8.—**Law of the Case**.—Where, on second trial, the evidence as to a material issue was the same as on the first trial, where judgment was reversed for insufficiency of evidence, a different disposition of the case was uncalled for.—*Kimball Bros. Co. v. Fitzgerald*, Neb., 118 N. W. 1076.

9.—**Newly Discovered Evidence**.—An affidavit as to newly discovered evidence will not be considered unless included in a bill of exceptions.—*Crocker v. Steidl*, Neb., 118 N. W. 1083.

10.—**Scope of Inquiry**.—An appeal from a final judgment of the county court only brings up the record proper, the trial in the circuit court being de novo, and former proceedings in the county court to establish a private way could only be made a part of the record on appeal in a subsequent proceeding by being offered in evidence in the circuit court and embodied in the bill of exceptions.—*Fitzmaurice v. Turney*, Mo., 114 S. W. 504.

11. **Arson**—Husband and Wife.—A husband or wife cannot be guilty of burning the dwelling house which they jointly occupy.—*Kopeczynski v. State*, Wis., 118 N. W. 863.

12. **Assignment for Benefit of Creditors**—Preferences.—A transfer of goods to enable the transferee to dispose of them and pay such of the owner's creditors as he saw fit held not an assignment for benefit of creditors, as such assignments cannot give preferences.—*Hall v. Feeney*, S. D., 118 N. W. 1038.

13. **Attorney and Client**—Attorney's Lien.—The statute giving an attorney a lien for fees does not prevent the client from settling the litigation subject to his attorney's claim without the attorney's consent.—*Boyle v. Metropolitan St. Ry. Co.* Mo., 114 S. W. 558.

14.—**Contract for Compensation**.—Contract to pay attorney in a will contest a stipulated fee if the will is defeated and his clients made their shares held satisfied where the attorney's services result in a compromise agreement.—*Ingersoll v. Coram*, U. S. S. C., 29 Sup. Ct. 92.

15. **Bail**—Action on Bond.—Where the only order made by the judge contemplated the taking of a bond with reference to a particular charge, a bond taken with reference to a different charge held not to bind the surety.—*State v. Simpson*, La., 47 So. 622.

16. **Bankruptcy**—Appeals.—An appeal in bank-

ruptcy will be dismissed where citation was not issued nor the assignment of errors filed until after a term of the Circuit Court of Appeals had intervened, and the transcript was not filed until after a second term had passed, and no showing was made in excuse of the delay.—*Nazima Trading Co. v. Martin*, U. S. C. C. of App., Ninth Circuit, 164 Fed. 828.

17.—**Collateral Attack.**—An adjudication of bankruptcy based on a finding that because of insolvency a receiver was appointed for the property of the alleged bankrupt under the laws of a state which is made an act of bankruptcy by Bankr. Act, c. 541, sec. 3a(4), is conclusive as to such fact, and cannot be collaterally attacked.—*In re Hecox*, U. S. C. C. of App., Eighth Circuit, 164 Fed. 823.

18.—**Discharge.**—Evidence held to sustain the finding of a referee that the failure of a bankrupt to keep such books of account as would disclose his financial condition was intentional and with a purpose to conceal such condition, and that he was therefore not entitled to a discharge.—*In re Goldich*, U. S. D. C., E. D. Pa., 164 Fed. 882.

19.—**Property Passing to Trustee.**—A contract under which a bankrupt was in possession of personal property held one of lease and not of sale, and the lessor held entitled to reclaim the property from the trustee.—*McEwen v. Totten*, U. S. C. C. of App., Fifth Circuit, 164 Fed. 837.

20.—**Stay of Proceeding on Judgment.**—An order staying a judgment creditor of a bankrupt from proceeding to collect his judgment until the bankrupt's right to a discharge has been disposed of will not be vacated because, under Code Civ. Proc. N. Y., sec. 1391, as amended by Laws 1908, p. 433, c. 148, the creditor is entitled to take on execution 10 per cent. of the debtor's salary.—*In re Van Buren*, U. S. D. C., S. D. N. Y., 164 Fed. 883.

21.—**Banks and Banking.**—Application of Ward's Funds to Guardian's Account.—Where a bank with knowledge, credited money of wards to the individual account of the guardian, it could not escape liability for misappropriating the wards' funds to payment of an individual debt of the guardian.—*First Nat. Bank of Owen-ton v. Greene*, Ky., 114 S. W. 322.

22.—**Withdrawal of Stockholder.**—A stockholder in a national bank, who gave notice of withdrawal on the renewal of its charter, as permitted by Act July 12, 1882, c. 290, sec. 5, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), and took all reasonable measures to have his stock appraised and paid for, held not liable, on the ground of estoppel, for an assessment made on the subsequent appointment of a receiver for the bank.—*Kimball v. Apsey*, U. S. C. C. of App., First Circuit, 164 Fed. 830.

23.—**Benefit Societies.**—Obligation to Pay Assessments.—A member of a beneficial association contracting to pay its assessments held liable to pay an assessment, for non-payment of which his rights are forfeited, but not liable to pay further assessments.—*Faurot v. Swan*, Mich., 118 N. W. 955.

24.—**Bills and Notes.**—*Bona Fide Purchasers.*—One who takes in payment of a private debt the note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularities that may exist in its execution.—*Kipp v. Smith*, Wis., 118 N. W. 848.

25.—**Defenses.**—Where a corporation took over the assets of a private bank, and assumed the bankers' liabilities among which was the note sued on, the corporation took subject to the defense that the note never became a binding obligation of the maker.—*Paulson v. Boyd*, Wis., 118 N. W. 841.

26.—**Bridges.**—Use for Travel.—Whether holes in the approach to a county bridge constituted defects rendering the approach unsafe was a question for the jury.—*Hubbard v. Montgomery County*, Iowa, 118 N. W. 912.

27.—**Carriers.**—Injury to Freight.—The burden of proof is on the carrier to exempt himself from liability in case of loss or damage by showing that it was occasioned by an exception exempting it from liability.—*Duncan v. Great Northern Ry. Co.*, N. D., 118 N. W. 826.

28.—**Injuries to Passenger.**—In an action by a passenger for injuries resulting from the explosion of a drum in the apparatus for heating the coach in which plaintiff was riding, evidence held sufficient to warrant submission to the jury of the question of defendant's negligence in failing to properly inspect and test the apparatus.—*Houston, E. & W. T. Ry. Co. v. Roach*, Tex., 114 S. W. 418.

29.—**Injuries to Person on Track.**—A passenger, before crossing a track at a railroad station while taking or leaving a train, is not required, as a matter of law, to look and listen for approaching trains, but is simply required to, exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury.—*Chicago, R. I. & P. Ry. Co. v. Stepp*, U. S. C. C. of App., Eighth Circuit, 164 Fed. 785.

30.—**Certiorari.**—When Allowed.—The remedy by certiorari is appropriate where the legal rights of the applicant have been so far invaded as to result prejudicially to him if the judgment remain unreversed.—*State v. Posz*, Minn., 118 N. W. 1014.

31.—**Chattel Mortgages.**—Attachment.—An attaching creditor of a chattel mortgagor cannot defeat a possessory action of a junior mortgagee by proof of a senior mortgage under which the attaching creditor does not claim.—*State Bank of West Union v. Keeney*, Mo., 114 S. W. 553.

32.—**Mortgaged Personal Property.**—A chattel mortgage rightfully in possession of the property after default can retain possession until the mortgage debt is paid, and it is error to adjudge him to pay to the mortgagor the difference between the amount of the debt and the value of the mortgaged property.—*Wagoner Nat. Bank v. Welch*, U. S. C. C. of App., Eighth Circuit, 164 Fed. 813.

33.—**To Secure Pre-Existing Debt.**—A chattel mortgage to secure a debt contracted at a prior date, under an agreement that a mortgage should be thereafter given, is valid.—*Kelly v. T. J. Ryan & Son*, Iowa, 118 N. W. 901.

34.—**Validity.**—Chattel mortgage, assigning, to secure a debt, future earnings of threshing machines, held invalid as to creditors without actual notice.—*Dyer v. Schneider*, Minn., 118 N. W. 1011.

35.—**Commerce.**—Interstate Commerce Investigations.—Witnesses cannot be required to testify before interstate commerce commission, except in connection with complaints for violation of the interstate commerce act, or with the

Investigation of subjects made the object of the complaint under Interstate Commerce Act.—Harriman v. Interstate Commerce Commission, U. S. S. C., 29 Sup. Ct. 115.

36. **Conspiracy**—Coal Lands.—A conspiracy to obtain title to coal lands of the United States, in violation of coal land laws held embraced by Rev. St. U. S., sec. 5440, making criminal conspiracies to defraud the United States.—United States v. Kettel, U. S. S. C., 27 Sup. Ct. 123.

37. **Constitutional Law**—Due Process of Law.—Due process of law is not denied owner or custodian of food in cold storage by an ordinance under which such food when unfit for human consumption may be seized, condemned, and destroyed without a hearing.—North American Cold Storage Co. v. City of Chicago, U. S. S. C., 29 Sup. Ct. 101.

38.—Impairment of Contracts.—A municipal corporation has only such power as the Legislature grants it which power is subject to legislative control, and is not protected by the federal constitution, prohibiting the impairment of obligation of contracts.—Mannie v. Hatfield, S. D., 118 N. W. 817.

39.—Judicial Remedies.—Laws 1907, p. 845, c. 197, in amendment of St. 1898, sec. 4069, providing that no officer or trustee of a corporation shall testify in its behalf as to a transaction with a decedent, held not to impair contractual or vested rights.—In re McNaughton's Will, Wis., 118 N. W. 997.

40.—Power of State Legislature.—A state legislature has full power to legislate on any subject, and to adopt its own rules, regulations, and methods of enacting such legislation, unless prohibited by the constitution.—Conek v. Skeen, Va., 63 S. E. 11.

41.—Presumptions in Favor of Constitutionality.—Every statute is presumed to be constitutional, and cannot be declared otherwise unless it is so clearly unconstitutional as to leave no doubt; and of two constructions that will be adopted which will render it constitutional.—Adams Express Co. v. Charlottesville Woolen Mills, Va., 63 S. E. 8.

42.—Prohibiting Loan for Poll Tax.—Act 1905 (Laws 1905, p. 561, c. 11) sec. 170, prohibiting loans for the payment of poll tax, held not a deprivation of rights without due process of law.—Solon v. State, Tex., 114 S. W. 349.

43.—Regulation of Telephone Rates.—Municipal regulation of rates of a telephone company on a lower scale than those prescribed for a competitor held not to necessarily deny the equal protection of the laws.—Home Telephone & Telegraph Co. v. City of Los Angeles, U. S. S. C., 29 Sup. Ct. 50.

44. **Continuance**—Absence of Witness.—Defendant held not entitled to a continuance for absence of a witness who was really the defendant in the action.—Theodore R. Troendle Coal Co. v. R. Morgan Coal, Coke & Mining Co., Ky., 114 S. W. 312.

45. **Contracts**—For Convict Labor.—A contract is not void, as against public policy, unless it is injurious to the interest of the public or contravenes some established interest of society.—Hall v. O'Neil Turpentine Co., Fla., 47 So. 609.

46. **Convicts**—Contract for Subhiring.—Contract of subhiring of convicts held not void as against public policy.—Hall v. O'Neil Turpentine Co., Fla., 47 So. 609.

47. **Corporations**—Authority of Officers to

Convey Land.—The act of the secretary and treasurer of a corporation in contracting to convey land binds the corporation where he was clothed with apparent authority to do what he did.—Curtis Land & Loan Co. v. Interior Land Co., Wis., 118 N. W. 853.

48.—Corporate Existence.—Where the articles of incorporation of a company are not in evidence, no special charter being shown, it may be presumed that it was organized under the general incorporation statute. St. 1898, Sections 1771—1791m.—Wisconsin River Improvement Co. v. Pier, Wis., 118 N. W. 857.

49.—Ratification of Contract.—Where a company, by reason of a contract to furnish power, executed by its manager, undertook to furnish the power, ratifying the contract to that extent, no showing of previous authority of the manager was necessary to hold the company under contract.—Kimball Bros. Co. v. Citizens' Gas & Electric Co., Iowa, 118 N. W. 891.

50. **Courts**—Proper District for Suit.—Objection that suit in the federal court between citizens of different states was not brought in the proper district held waived by demurrer and answer.—Ingersoll v. Coram, U. S. S. C., 29 Sup. Ct. 92.

51. **Covenants**—Widow's Dower Not an Incumbrance.—A widow's dower, being a mere life estate, is not an incumbrance on lands of a decedent, and is not a breach of covenant of warranty in a deed by an heir to a co-heir conveying the grantor's interest in the lands owned by decedent at his death.—Combs v. Combs, Ky., 114 S. W. 334.

52. **Criminal Evidence**—Circumstantial Evidence.—Where the evidence relied on to convict is entirely circumstantial, and without probative value, and not exclusive of every reasonable hypothesis except that of guilt, the conviction was unauthorized.—Jamison v. State, Ga., 63 S. E. 25.

53.—Confessions.—A voluntary confession may with slight corroborating circumstances establish the corpus delicti.—Cohoe v. State, Neb., 118 N. W. 1088.

54.—Corpus Delicti.—That the person killed is the one whose death is the subject of the inquiry must appear from some proof other than extrajudicial confessions or admissions.—Wall v. State, Ga., 63 S. E. 27.

55. **Criminal Law**—Venue of Larceny.—The venue of larceny of money by a bailee where the transaction extends through different counties may be laid in the county in which the bailment arose.—Cohoe v. State, Neb., 118 N. W. 1088.

56. **Criminal Trial**—Harmless Error.—A conviction will not be reversed for the erroneous exclusion of a witness' answer to a question, where the record shows that the identical language contained in the answer was allowed to stand in another part of the witness' testimony.—Fleming v. State, Tex., 114 S. W. 383.

57.—Instructions.—A charge that, when a killing is shown, the law presumes malice, and the burden is on the prisoner to justify or mitigate the homicide, held erroneous, where the evidence is an admission of the defendant presenting matters of exculpation.—Wall v. State, Ga., 63 S. E. 27.

58. **Customs and Usages**—Contracts.—Payment for removing the earth which may slide into a channel from the sides during excavation held clearly excluded by a dredging contract so

as to prevent giving the words "measured in place" a trade meaning demanding a different construction.—*Bowers Hydraulic Dredging Co. v. United States*, U. S. S. C., 29 Sup. Ct. 77.

59.—**Varying Rule of Employer.**—In an action against a railway company for injury to an employee involving a rule of the company, evidence of a customary observation of the rule was not inadmissible as tending to vary the terms of the rule.—*Galveston, H. & N. Ry. Co. v. Murphy*, Tex., 114 S. W. 443.

60. **Damages.**—Theory of Pecuniary Reparation.—Damages are awarded by way of compensation and, in breach of contract, they are such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of its breach.—*Kimball Bros. Co. v. Citizens' Gas & Electric Co.*, Iowa, 118 N. W. 891.

61. **Deeds.**—Construction.—The rule of construction that an ambiguity in a grant must be construed against the grantor should not be invoked until the application of other rules has failed to elucidate the grantor's intention.—*Bernero v. McFarland Real Estate Co.*, Mo., 114 S. W. 531.

62.—**Construction.**—At common law a deed to a designated person by name, omitting the use of the term "heirs," passed only a life estate, though it purported to convey the land to the grantee forever or to him and his assigns forever.—*Teague v. Sowder*, Tenn., 114 S. W. 484.

63.—**Deposit for Delivery on Grantor's Death.**—A deed deposited in a bank to be delivered to the grantee at the grantor's death, if so deposited with the intention that the grantor should retain title until his death, was testamentary in character, and would not pass title.—*Felt v. Felt*, Mich., 118 N. W. 953.

64. **Drains.**—Taxation.—An agreement between complainant and the tax collector to offset the amount to become due complainant under an uncompleted contract with township to build drain, against the taxes on his land on account of the drain, was invalid.—*Harrington v. Dickinson*, Mich., 118 N. W. 931.

65. **Ejectment.**—Pleading.—Where the answer in ejectment joined issue upon every material allegation of the complaint and denied plaintiff's ownership, it need not affirmatively allege ownership in defendant's wife; but such averment did not render the answer defective.—*Holland v. Coleman*, Ky., 114 S. W. 305.

66. **Election of Remedies.**—Specific Performance.—Where plaintiffs sued to recover advance payment on land, they cannot thereafter dismiss the action and sue for specific performance.—*Stanton v. Drifkorn*, Neb., 118 N. W. 1092.

67. **Elections.**—Qualifications of Voter.—The legislature, while not entitled to add to the qualifications of voters, may nevertheless make such regulations as shall detect and punish fraud and preserve the purity of the ballot.—*Solon v. State*, Tex., 114 S. W. 349.

68. **Electricity.**—Contract to Supply Power.—In an action for breach of a contract to furnish electrical power, testimony as to the difficulty of using a motor such as plaintiff had with the current used by defendant held improperly excluded.—*Kimball Bros. Co. v. Citizens' Gas & Electric Co.*, Iowa, 118 N. W. 891.

69. **Embezzlement.**—Tax Collector.—On the trial of a tax collector for embezzlement, held incumbent on him to show what had become of the claims intrusted to him for collection.—*State v. Dudenhefer*, La., 47 So. 614.

70. **Eminent Domain.**—Dams.—A company having the right of eminent domain in aid of navigation held empowered to exercise the right to acquire lands on which another company should build a dam at its own expense, which would aid navigation.—*Wisconsin River Improvement Co. v. Pier*, Wis., 118 N. W. 857.

71. **Estoppel.**—Nature and Grounds.—The doctrine of estoppel extends to real and personal property, and rests on the theory that a person who has induced another to believe and act in a certain manner will not afterwards be permitted to prejudice such person, because of the acts done under the belief that they were consented to.—*Trimble v. King*, Ky., 114 S. W. 317.

72.—**Transfer of Homestead.**—Where a husband, without his wife joining, transferred part of their homestead, and she afterwards abandoned the homestead and acquiesced in its partition between her deceased husband's heirs and herself, the husband's deed became effective by estoppel.—*Wooten v. Pennock*, Tex., 114 S. W. 465.

73. **Evidence.**—Bank Books.—Where bank books are admissible in evidence as books of original entry, if the figures or abbreviations therein are not self-explanatory, oral evidence is admissible to indicate the meaning intended.—*Kossuth County State Bank v. Richardson*, Iowa, 118 N. W. 906.

74.—**Hearsay.**—Hearsay testimony that beans purchased by plaintiff of defendant were not of the character ordered held admissible to show when plaintiff learned that he had been defrauded.—*McNitt v. Henderson*, Mich., 118 N. W. 974.

75. **Exceptions, Bill Of.**—Extending Time for Settlement.—A district judge is without authority, after 80 days from the adjournment of the term of court sine die, to extend the time for settling the bill of exceptions.—*Bressler v. Wayne County*, Neb., 118 N. W. 1054.

76. **Executors and Administrator.**—Claims Against Estate.—A claim against a decedent's estate in the hands of the administrator with the will annexed in one state is not barred because it was barred against the estate of decedent in the hands of the domiciliary executors in another state.—*Wilson v. Hartford Fire Ins. Co.*, U. S. S. C. of App., 164 Fed. 817.

77. **Federal Courts.**—Establishment of Railway Rates.—A federal circuit court on principles of comity should not entertain a suit for injunctive relief against railway passenger rates fixed by the Virginia State Corporation Commission in advance of the appeal to the highest state court from the order fixing the rates.—*Prentiss v. Atlantic Coast Line Co.*, U. S. S. C., 29 Sup. Ct. 67.

78.—**Jurisdiction.**—Jurisdiction of federal court, on controversy between citizens of different states on a bill to foreclose attorney's lien on the property of a decedent in the district held not defeated because settlement of estate is pending in the state probate court.—*Ingersoll v. Coram*, U. S. S. C., 29 Sup. Ct. 92.

79. **Fixtures.**—Construction of Lease.—A lease, providing that all improvements or alterations made by the tenant should belong to the landlord, held not to include saloon fixtures loaned to the tenant by a brewery company.—*Wright v. La May*, Mich., 118 N. W. 964.

80. **Fraud.**—Statement of Fact.—A positive statement by a landowner that the land contained so many acres of cleared land was a statement of fact, and not of opinion, so that

the purchaser could maintain an action for deceit if it was false.—*Vincent v. Corbitt*, Miss., 47 So. 641.

81. **Frauds, Statute Of**—Parol License as to Use of Land.—A parol license, if creating an interest in land within the statute of frauds, held valid because of the performance under it.—*Ruthven v. Farmers' Co-Op. Creamery Co.*, Iowa, 118 N. W. 915.

82. **Fraudulent Conveyances**—Consideration.—A debtor cannot dispose of his property to a third person without consideration, and authorize him to sell the property and pay the proceeds to such of the debtor's creditors as he deems proper.—*Hall v. Feeney*, S. D., 118 N. W. 1038.

83.—**Preferences**.—Where a debtor, by a purported conveyance, placed his stock of goods in charge of his son to enable him to close the business and pay any of the father's creditors he saw fit, the creditors of the latter could not sue the son, as he had not assumed the debt or agreed to pay any particular debt.—*Hall v. Feeney*, S. D., 118 N. W. 1038.

84. **Guaranty**—Nature of Contract.—A writing held not to be an original promise, but an offer to stand liable as a guarantor so as to require notice of acceptance in order to bind the guarantor.—*Detroit Free Press v. Pattengill*, Mich., 118 N. W. 927.

85. **Garnishment**—Effect as Between Defendant and Garnishee.—That a garnishee in his answer incorrectly states the amount due defendant, and judgment is rendered on such answer, does not estop defendant from thereafter denying the correctness of such answer.—*Combs v. Combs*, Ky., 114 S. W. 334.

86. **Guardian and Ward**—Void Sale of Ward's Property.—In action by guardian to recover property of ward unlawfully sold by former guardian, plaintiff need not return, or offer to return, the price which never came into his hands.—*Gentry v. Bearss*, Neb., 118 N. W. 1077.

87. **Health**—Police Power.—The right of an owner of land in a populous community to erect buildings on the land intended for the resort of great numbers of people is subject to the police power of the state.—*McGee v. Kennedy*, Ky., 114 S. W. 298.

88. **Homicide**—Manslaughter.—Manslaughter in the fourth degree is the involuntary killing of another in the heat of passion, or any homicide which would be manslaughter at common law, and which is not excusable nor justifiable, or is not declared to be manslaughter in some other degree.—*State v. Goldsby*, Mo., 114 S. W. 500.

89.—**In Perpetration of Arson**—Homicide committed in the perpetration of arson is but one of the methods by which murder in the first degree may be committed.—*State v. Bobbitt*, Mo., 114 S. W. 511.

90. **Husband and Wife**—Agency of Husband.—Ordinarily the acts and words of the husband regarding his wife's property are not binding on her.—*Baker v. Thompson*, Mo., 114 S. W. 497.

91.—**Community Property**—Land acquired during the existence of a second marriage, by the exchange of land which constituted community property of the first marriage, does not become community property of the second marriage.—*Haring v. Shelton*, Tex., 114 S. W. 389.

92.—**Property Rights**—Rights of husband and wife in a land contract and in a mortgage given by the vendor to secure his performance

of the contract held to pass to the wife by right of survivorship on husband's death.—*Comfort v. Robinson*, Mich., 118 N. W. 943.

93. **Indians**—Land Allotment.—The Secretary of the Interior is without authority to erase from the approved rolls of citizenship in the Choctaw and Chickasaw Nations, without notice or hearing, the name of one who has received an allotment certificate and is in possession of the land.—*Garfield v. United States*, U. S. S. C., 29 Sup. Ct. 62.

94. **Indictment and Information**—Conjunctive Allegations.—When a penal statute mentions several acts disjunctively, and provides that each shall constitute the same offense and be subject to the same punishment, an information may charge one or all of such acts conjunctively as constituting a single offense.—*State v. Pirkey*, S. D., 118 N. W. 1042.

95. **Injunction**—Violation.—Where defendants were only charged with contempt for violating a restraining order, and the issues were made upon the violation of that order, they can only be adjudged guilty of violating that order, and not of an injunction granted on a bill on which the order was issued.—*Castleman v. State*, Miss., 47 So. 647.

96. **Intoxicating Liquors**—Grant of License.—A man frequently under influence of liquor, and who permits gambling in his place of business, held not of respectable character within *Cobbe's St.* 1907, sec. 7150.—*Woods v. Garvey*, Neb., 118 N. W. 1114.

97.—**Illegal Sale**.—One engaged in traffic of whisky is guilty of selling whisky, within the meaning of an ordinance regulating the sale of liquor.—*State v. Small*, S. C., 63 S. E. 4.

98. **Judges**—Correction of Judgment After Term.—A court can make any amendment after the term at which a judgment is rendered necessary to show the actual judgment and findings, or to correct an omission.—*Carney v. Twitchell*, S. D., 118 N. W. 1030.

99. **Judgment**—Ancillary Administration.—Judgment against ancillary administrator in a suit to enforce a lien on interest in distributive shares of property of a decedent held no bar to a suit by an ancillary administrator in another jurisdiction.—*Ingersoll v. Coram*, U. S. S. C., 29 Sup. Ct. 92.

100.—**Office Judgment**.—Where plaintiff had done all that was required to entitle him to his office judgment, he could not be prejudiced by the failure of the clerk to enter the rules properly as required by statute.—*Southern Express Co. v. Jacobs*, Va., 63 S. E. 17.

101.—**Railroad Rates**.—The establishment of railway passenger rates by the Virginia Corporation Commission held not res judicata in a suit which seeks injunctive relief on the ground that the rates are confiscatory.—*Prentiss v. Atlantic Coast Line Co.*, U. S. S. C., 29 Sup. Ct. 67.

102. **Jurisdiction**—Justices of the Peace.—The value of the rights involved in forcible detainer proceedings will not oust the jurisdiction of the justice's court, if it otherwise has jurisdiction.—*Walther v. Anderson*, Tex., 114 S. W. 414.

103. **Landlord and Tenant**—Leases.—A lease being for a certain term with power to sublet with the lessor's consent, and providing that any breach of condition should terminate it and authorize re-entry without notice or demand, subletting without the lessor's consent termi-

nated the lease *inso facto*.—*Walther v. Anderson*, Tex., 114 S. W. 414.

104. **Larceny**—Instructions.—A purse accidentally left in a certain place held not lost so as to require a charge, on a trial for its theft, on the finding of lost property.—*Moxie v. State*, Tex., 114 S. W. 375.

105. **Possession of Recently Stolen Property**.—On a trial for larceny, when the only evidence relied on was possession of recently stolen property, the court should, without request, submit the question whether the explanation was satisfactory.—*Morris v. State*, Ga., 63 S. E. 26.

106. **Libel and Slander**—Evidence.—Evidence that a prosecuting attorney neglected to investigate the character of prosecuting witness is inadmissible on cross-examination of that officer under a plea of the general issue, as tending to rebut the allegation and declaration in an action for libel charging him with using his office to procure an indictment as part of a conspiracy to blackmail.—*Pickford v. Talbot*, U. S. S. C., 29 Sup. Ct. 75.

107. **Life Insurance**—Deduction from Face of Policy.—Beneficial society held to have the right in settling with a beneficiary to deduct the difference between the monthly assessments in force when the certificate was issued and an increased rate from the time it went into effect until the member's death, but not for the balance of his life expectancy.—*Johnson v. Bankers' Union of the World*, Neb., 118 N. W. 1104.

108. **Mandamus**—To Control Executive Action.—Mandamus is the proper remedy where the Secretary of the Interior without authority has erased from the rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate.—*Garfield v. United States*, U. S. S. C., 29 Sup. Ct. 62.

109. **Master and Servant**—Dangerous Machinery.—An assurance by a master to a servant that a machine is not dangerous does not render the master liable for injuries to the servant, where the servant did not in fact rely on such assurance.—*Nelson-Bethel Clothing Co. v. Pitts*, Ky., 114 S. W. 331.

110. **Injuries to Servant**.—A manufacturing company operating sewing machines held not bound to anticipate that an operator would get her hair caught in the revolving shaft.—*Nelson-Bethel Clothing Co. v. Pitts*, Ky., 114 S. W. 331.

111. **Injury to Servant**.—Rule of railway company construed, and engineer of switch engine held not required to stop his engine in the clear of a main track until the switch light has been turned.—*Dwyer v. Northern Pac. Ry. Co.*, Minn., 118 N. W. 1020.

112. **Motions**—Orders Nunc Pro Tunc.—A nunc pro tunc order held not to validate an order appointing a receiver for a corporation.—*Davis Colliery Co. v. Charlevoix Sugar Co.*, Mich., 118 N. W. 929.

113. **Municipal Corporations**—Criminal Prosecutions.—Where the mayor of a city obtained jurisdiction over an offense, the court on appeal was required to try the cause *de novo*, and should not dismiss for mere error of law.—*City of Searcy v. Turner*, Ark., 114 S. W. 472.

114. **Presumptions as to Corporate Beginning**.—A town will be presumed to have had its beginning about the time the plat was recorded, though not incorporated until many years later.—*Town of Exira v. Whitted*, Iowa, 118 N. W. 917.

115. **Segregation of Territory**.—Where certain territory was excluded from corporate limits of city in 1896, and from that date until 1907 the city had acquiesced in such exclusion, it is estopped by long acquiescence from questioning the validity of the method adopted by the council in attempting to segregate it.—*State v. Willis*, N. D., 118 N. W. 820.

116. **Negligence**—Concurrent Negligence.—One whose negligence directly contributes to an injury cannot recover of another whose negligence concurred to cause it.—*Chicago, R. I. & P. Ry. Co. v. Baldwin*, U. S. C. C. of App., 164 Fed. 826.

117. **Failure to Act**.—Lack of vigilance or a negligent failure to act may constitute contributory negligence as well as negligent action.—*Douglass v. Southern Ry. Co.*, S. C., 63 S. E. 5.

118. **Nuisance**—Creamery.—An agreement between a creamery company and an owner of land for the discharge on the land of creamery sewage held a defense to an action by the owner for a private nuisance created by the sewage.—*Ruthven v. Farmers' Co-Op. Creamery Co.*, Iowa, 118 N. W. 915.

119. **Maintaining of Dam**.—One maintaining a dam constituting a nuisance in a navigable stream held not liable to a mill owner for the detention of his logs by the dam before the mill owner notified him to remove it.—*Ireland v. Bowman & Cockrell*, Ky., 114 S. W. 338.

120. **Parent and Child**—Duty to Support Child.—Parents held legally bound to provide for the support of their children during their infancy, though the children have estates of their own, unless the parents have no means, or their estate is limited.—*First Nat. Bank of Owenton v. Green*, Ky., 114 S. W. 322.

121. **Partnership**—Liability of Continuing Partner.—A continuing partner, who has assumed the firm liabilities, cannot avoid liability on the ground of rescission, where he fails to show an offer to rescind or to restore the consideration received.—*Mueller Lumber Co. v. McCaffrey*, Iowa, 118 N. W. 903.

122. **Perpetuities**—Corporation as "Life in Being".—A corporation or joint-stock company to which an annuity is bequeathed held not a life in being, where to so regard it would cause a testamentary trust to violate the rule against perpetuities.—*Fitchie v. Brown*, U. S. S. C., 29 Sup. Ct. 106.

123. **Physicians and Surgeons**—License.—A person licensed to practice medicine and surgery cannot practice dentistry without securing license as a dentist, required by Gen. Laws 1907, p. 127, c. 117.—*State v. Taylor*, Minn., 118 N. W. 1012.

124. **Pleading**—Variance.—A variance between the cause of action stated in the complaint and in the summons held not to entitle defendant to a dismissal of the complaint or a setting aside of the summons.—*Bradley v. Mueller*, S. D., 118 N. W. 1035.

125. **Private Roads**—Establishment.—In proceedings against several defendants to establish a private way, that a part of defendants did not appeal from the judgment of the county court would not prevent the circuit court from having jurisdiction of the appeal.—*Fitzmaurice v. Turney*, Mo., 114 S. W. 504.

126. **Prohibition**—Subjects of Relief.—A chancery court and the chancellor will be prohibited from entertaining jurisdiction of a suit to partition land, etc., where a suit at law by

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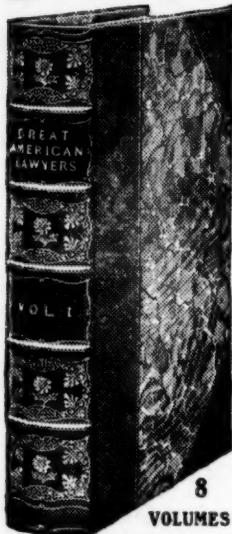
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